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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

vs.

David Allen Harbour,

Defendant.

Case No. 2:19-cr-00898-DLR

**DEFENDANT'S RESPONSE TO
UNITED STATE'S
SUPPLEMENTAL MOTION RE:
RESTITUTION AND LOSS**

Unlike the government, which filed Doc. 848 without asking the Court for leave to do so, before Harbour filed a supplemental sentencing memorandum (based upon Burgess' testimony and the documents he supplied on 12-2-23), we asked and received the Court's permission to file papers responding to the new material.

Given the predilection of the government to move to strike whatever it can, whenever it can, we should think that the Court ought to strike this unauthorized pleading.¹ However, as Doc. 848 is nothing more than another compilation of false

¹ The next day, the government filed another document with leave, this one responding to the Supplemental Filing the Court allowed the Defense to file. However, because *that* document actually responded – as best the government could respond – to the Defense filing pertaining to Burgess' testimony and documents, we do not complain about it. Although the government never sought leave to respond to our filing re Burgess, the defense would not have thought to oppose the response. Instead, we will reply to it. For,

1 representation, we will regard this unauthorized supplemental sentencing memorandum
2 as just another opportunity, in the hope that, as the government piles misrepresentation
3 upon misrepresentation, *ad infinitum*, the Court will finally come to understand that the
4 government is far from a “minister of justice” in this case and unworthy of belief.

5 The government wants to allocate Burg's restitution to Pat and Carol Hill,
6 disregarding that the case law requires loss causation with respect Burg being entitled to
7 any Restitution. Burg is not entitled to restitution because there is no loss causation with
8 respect to him. Where is Burg’s money? Burgess used it, in part, to help pay off Ranger.

9 The government begins its misrepresentations by stating that Harbour dropped
10 Jackson's name to solicit Gray, Alofs and Wilson. This is, frankly, unhinged. Alofs and
11 Jackson were in an intimate relationship. Harbour met Alofs through Jackson in 2009.
12 Meanwhile, Alofs was friends with Alison Willson and after she told Willson that she,
13 Alofs, had loaned money to Harbour in 2010, a year after Jackson’s loan, Willson then
14 reached out to Harbour.

15 Harbour met Jackson through the same person through whom Rhonda Gray met
16 Jackson. This was Grays insurance agent. Gray was a plus-one of the insurance agent at
17 the Child Help Gala in 2010 and introduced Gray to Jackson and to Harbour the same
18 evening. Gray testified she met with her lawyer, CPA and insurance agent to figure out
19 how to protect her life insurance money. It was they who recommended that Harbour
20 assist Gray. Harbor and Gray agreed that her money should be put into the hospital bridge
21 loan.

22 The government then states that Harbour used Jackson's money to either pay other
23 investors or pay for his own personal expenses. This contradicts the Prosecutors proffers
24 to the Court to get the Jackson evidence into the trial. Recall that the Prosecutor told the
25

26
27 if the right to respond can be assumed, based upon the permission given to the defense to
28 file, the right to reply can also be assumed.

1 Court he had traced \$15 million into Harbour's bank account and traced the money out.
2 This was flatly false.

3 Although the Court asked the Prosecutor at two different hearings if he had
4 Harbour's bank statements that traced the money and the Prosecutor told the Court he did,
5 in fact, he never had the bank statements. While earlier pleadings filed by the defense had
6 demonstrated the government's lack of knowledge with respect to Tax Court, here we can
7 see that the government is equally bereft of knowledge concerning State Receiverships.

8 Jackson signed a subscription agreement with Palo Verde Capital and wired \$9
9 million to Palo Verde. Meanwhile, Jackson wired Harbour \$6 million and was paid back
10 all \$6 million. Harbour never got the \$9 million and, if he had, then the Receiver would
11 not have *approved* Jackson's personal claim for the \$6.8 million of the \$9 million
12 Jackson had received back from Palo Verde. We know the Court understands that, if
13 Jackson had not filed a proof of claim under penalty of perjury that he had invested the
14 \$9 million in Palo Verde, the Receiver would not have approved the claim. If Harbour
15 got the money and Harbour put it into Palo Verde, then it would have been Harbour's
16 claim. We have previously supplied the Receivership documents establishing this beyond
17 peradventure.

18 With respect to Alofs, not only does the government completely ignore the-
19 intimate relationship the government knew existed between her and Jackson, the
20 government also knows nothing about Alofs' loans. She actually had two different loans
21 with Harbour, one in July 2010 and one in May 2011. The first loan was to the Hospital
22 company that filed bankruptcy and, actually, Alofs met directly with multiple executives
23 who comprised the Hospital management team. This is also where Rhonda Gray's money
24 went, as her notes indicate. Alofs second loan was to Canyon Road Holdings which paid
25 Alofs back 100% of her money with interest.² Everyone in the Hospital investment was
26

27 2 The lenders to payday one in the spring of 2011 were all paid back, because they had
28 two year loan agreements and their loans matured prior to Operation Choke Point.

1 tied to the Bankruptcy and the Affordable Care Act. Harbour was not the cause of Alof's
2 loan being defaulted. Alof's never sued Harbour for any fraud or misrepresentations. It
3 was a simple breach of contract against HPCG, not Harbour.

4 The government then states that Reace, White and Donmoyer all lost money due
5 to Harbour's fraud. We will unpack this false statement by the Prosecutor. *First*, the
6 government has never turned over any documents between Harbour and White. Nor will
7 they, White never loaned money to Harbour nor invested money with Harbour. *Second*,
8 Reace signed a subscription agreement that she understood the risk of investing. The
9 bankruptcy court approved HPCG Hospital Investment proof of claim that Harbour sent
10 all the investors' money to the Hospital Investment. This included Reace, Alofs and
11 Gray.

12 There has never been any allegations of fraud with respect to the Hospital
13 investment. *Third*, the government alleges that Donmoyer was not made aware of
14 Harbour receiving a 25% Finder's Fee with respect to his \$3 million loan. What
15 Donmoyer actually stated was that, if Harbour did receive a 25% Finder's Fee, Harbour
16 would have a deposit of \$750,000 (25% of \$3 million). Of course, Harbour's bank
17 statements show no deposit of \$750,000 and this corroborates the testimony of Agent
18 Green and Paige that Harbour did not receive any gross income from KSQ connected to
19 the 25% Finder's Fee. Of course, per the government, the 25% Finder's Fee issue is now
20 moot, because, according to the government, in its desperation to avoid the new trial the
21 Court truly must grant, the government contends that Harbour's gross income is "not
22 probative of any material fact in the case." (Doc.844, pg.4, ll.23-24)

23 Next, the government has provided a restitution table that is *not* supported by the
24 Court's ruling in Doc. 801. There, the Court ruled Rhonda Gray and Victoria and Ken
25 Bobrow could not meet even the preponderance of the evidence test for purposes of
26 forfeiture and therefore, they could hardly meet the test for Restitution which also
27 requires loss causation analysis.
28

1 The government included Carol Hill's IRA of \$81,621.34, even though Paige
2 testified there is no evidence Carol Hill actually sent her IRA proceeds to NorthRock.
3 The evidence at the trial of Carol Hill IRA paper work was for \$79,351.02, not
4 \$81,621.34 (Exhibit 252). Pat and Carol Hill \$500,000 requires loss causation to be
5 eligible for Restitution and the evidence proved Operation Choke Point is why they lost
6 their money, not Harbour. The same goes for Joe Cathey (who dismissed his civil lawsuit
7 against Harbour for fraud). Harbour is not the reason anyone connected with pay day
8 lending before June 2013 lost money. What Professor Manning (whose opinions have
9 never been questioned by the government, let alone rebutted) termed a \$4-6 billion
10 wealth transfer, took that money away from people like Cathey, the Hills, Bobrow,
11 Donmoyer, Dyer, Bobrow's investors and everyone else, was Operation Choke Point.

12 Meanwhile, in Doc. 804, the Defense proved there was no fraud against Ken
13 Bobrow and Pam Case and they were paid back 100% of their money. Therefore they are
14 not eligible for restitution. The case law requires for Restitution, they must fall under the
15 requirements of the Mandatory Victims Restitution Act ("MVRA") an individual will be
16 "proximately harmed as a result of" the defendants crime if either there is no intervening
17 causes, or if there are any such causes, if those causes are directly related to the
18 defendants offense. *U.S. v Gossi* 608 F.3d 574 (9th Cir. 2010). A victim for restitution
19 purposes is a person who has suffered a "loss caused by specific conduct that is the basis
20 of the offense of conviction." For that reason, a restitution order must be based on losses
21 directly resulting from the defendants criminal conduct. *See U.S. v Sablan* 92 F.3d 865
22 870 (9th Cir. 1996).

23 The Prosecutor told the Court there is clear and convincing evidence Harbour
24 defrauded Jackson out of \$15 million. But, now, the government has changed its position
25 on Jackson once again. The government now agrees that Jackson's \$9 million went to
26 Palo Verde, adds a new false wrinkle: it was Harbour who sent the money. We have
27 already addressed how, if this was the case, the Receiver would not have accepted
28

1 *Jacksons* receivership claim. The government next falsely states the entirety of the \$15
2 million of Jackson is a two page agreement, which are the services Harbour would
3 provide for Jackson, claiming there are no agreements for the \$15 million (Doc.848, pg.5,
4 ll.6-8).

5 Does the government not recall that Exhibit 397, drafted by Jackson's lawyers
6 stated, at #24:

7
8 On or about August 20, 2009, the Trust (by Craig. H. Jackson) signed a
9 subscription Agreement whereby it purchased \$9 million of Partnership
10 Interest in the Palo Verde Fund, LP. On or about August 31, 2009, the Trust
funded the purchase of the Partnership interests via a \$9 million wire
transfer.”

11 Craig Jackson on behalf of his trust, signed a subscription agreement for \$9
12 million and wired the \$9 million directly to Palo Verde. This is in alignment with the
13 Receivership of Palo Verde Fund agreeing to Jackson's claim. Nothing states that
14 “Harbour had access” to the \$9 million or controlled the \$9 million. The Receivership
15 never mentions Harbour or that Harbour had any control of Palo Verde Fund or managed
16 the funds for Palo Verde.

17 The Prosecutor next shows that he did not even try to corroborate his witness’
18 testimony when he notes that Carol Hill testified Harbour was “skipping down the hall”
19 when he had achieved access to Jackson's money (Doc.848, pg.5, ll.10-11). However,
20 Hill testified that she started working for Harbour in 2010 (Tr.2/3/23, pg.19). Jackson
21 loaned Harbour the \$6 million in August 2009. Exhibit 397 ##8 and 9. As a result, after
22 reviewing those parts of Exhibit 397, Ms. Hill could not have seen Harbour “skipping
23 down the hall” with respect to Jackson’s money unless she was possessed of
24 clairvoyance.

25 These statements contradict the Prosecutors proffers to the Court. The Prosecutor
26 told the Court there are two Promissory Notes between Harbour and Jackson for the \$6
27 million and the \$9 million. The reference to a \$9 million note was complete fiction.
28

1 THE COURT: Let me back up. My recollection was like Mr. Dichter's is that there
2 was 6 million, and 9 million wasn't given to Mr. Harbour.

3 MR. RAPP: No, that's not true. It's -- there --Could we go to the HDMI to the
4 podium, Mr. Vasquez, and to the Court's screen. These are the two promissory
5 notes. (Hr. 6/6/23, pg.148)

6 The Defense has asked the Prosecutor for these two notes, but has never turned
7 them over. The Defense is perplexed by the Prosecutors now saying it was only a two
8 page document after telling the Court it had the actual promissory notes. Meanwhile,
9 Jason Braun, Jackson's lawyer testified that Harbour owed Jackson interest, which means
10 there was a Promissory Note (Tr. 2/15/23, pg.181). Braun testified that he along with
11 Jackson's other lawyers authored Exhibit 397 (Tr.2/15/23, pg.175). Exhibit 397 #19
12 states, "The monthly payments will continue until all of the accrued and accruing interest
13 and/or earnings are fully paid to the Trust, no later than December 31, 2012." The use of
14 the words "earnings," signifies that the Jackson side knew that Jackson's \$6 million had
15 been invested. Regardless, Exhibit 397 – drafted by Jackson's lawyers – did not claim the
16 \$6 million was *not* invested.

17 This supports there was a Promissory Note between Harbour and Jackson,
18 although Jackson's attorneys chose not to attach it to the Affidavit between Jackson and
19 Harbour. Since they created the Affidavit, it means they either forgot to attach it or they
20 believed it was in best interest of their client to not attach it. Rapp points out that Braun
21 stated that Harbour told him the \$6 million was "gift," but, if Harbour did say that, it is
22 certainly neither mentioned, nor, more importantly declaimed in Exhibit 397 which was
23 drafted by Braun.

24 The Prosecutor then tries to say that the only reason Harbour was paying Jackson
25 back was based upon a meeting Harbour had with Jackson attorney's in June 2012
26 (Doc.848, pg.6). The government references pg. 167 of Braun testimony for the date June
27 2012, nothing on page 167 mentions June 2012. Regardless, the Affidavit speaks for
28 itself. It states that Harbour and Jackson agreed in 2009, that he would be paid back in

2012 (Exhibit 397, #11-13). He was paid back in 2012, meaning there was no intent to defraud.

The Prosecutor then makes the statement that HighPointe Capital Group, DNA Investments and DNA Management were not investment vehicles. This contradicts the testimony of Purifoy and Eckholt. Eckholt testified that Harbour raised \$1 million each for two different clients and they paid him back (Tr.2/2/23, pg.227). This proves that Harbour had other business deals than payday lending and they were successful. This is also the same time frame that Harbour received the \$6 million from Jackson, proving Harbour was investing money. Purifoy testified she created the financial statements for HPCG (Tr. 2/14/23, pg.45). There would only be financial statements if there were investments and Agent Green testified that Harbour's business was fund-raising. In addition, Green audited Harbour for 2011-2014 and never even hinted that Harbour was running a Ponzi scheme.

The government states it is unclear what Harbour used Jackson's funds for but they were not invested (Doc.848, pg.7). Again, this is contrary to what the Prosecutor told the Court prior to the trial. He said he had traced the Jackson money out of Harbour's account. This was false. The government has not tied any of Jackson's money to any Ponzi payments or personal expenses of Harbour. The government keeps forgetting it has the burden to prove how the \$6 million was used by clear and convincing evidence. The Prosecutors own words admits it is not "clear" therefore it cannot be clear and convincing that it was used for Ponzi payments and pay personal expenses in its own admission.

The government next states that Harbour diverted the KSQ "returns" to pay Jackson (Doc.848, pg.7). This unsupported allegation has a multiple of issues. *First*, the Prosecutor stated that Harbour's "Gross Income is not probative of any material fact in the case"³ *Id.* Therefore, Harbour using his gross income from one of his entities to pay

³ 26 USCS Section 61(a) of the Internal Revenue Code provides a broad definition of gross income. Except as otherwise provided in this subtitle, gross income means all

1 Jackson back, DNA or otherwise, does not prove or support any material fact in the case,
2 including Jackson. *Second*, this Court ruled money is fungible, which follows the
3 Supreme Court's ruling that money is fungible. "The property returned need not be the
4 very same bills or checks" See *Roberts v US* 572 US 639 (Supreme Court 5-5-2014).
5 What gross income was used is irrelevant. *Third*, the government's argument means if
6 Harbour loaned Jackson's money to Company A and B, then only Company A and B
7 gross income can be used to pay Jackson back. This is nonsensical and not how business
8 works nor is it in alignment with the case law or was a requirement imposed by Jackson.

9 The government never met the burden to prove that Harbour did not invest
10 Jackson's money and of course, no charges in the SSI related to Jackson. *Fourth*, the
11 Prosecutor has once again changed his story. Now, the government claims Harbour
12 diverted the "return" owed to the lenders in order to pay Jackson. However, previously
13 the accusation was that Harbour never even sent the lenders' fund to KSQ. The evidence
14 in the trial was that Harbour did not divert any "returns" of DNA. The bank statements
15 and the testimony of Purifoy and Hill prove that Harbour paid the lenders when the
16 money came in from KSQ. Those payments are the "returns." The government admitted
17 they were all promissory notes, not Subscription agreements. Therefore the "returns"
18 were defined in the Promissory Note and once Harbour made the debt payment or the
19 "return" to the lenders the remaining money was Harbour's to spend as he choose.

20 *Fifth*, per Paige's tracing, Jackson was last paid by Harbour in June 2013 (accrued
21 interest) after repaying the entire \$6 million by the end of 2012. In June 2013 Harbour
22 made all the debt payments to the lenders whose money was sent to KSQ. Therefore
23 Harbour did not divert any "returns" that were supposed to go to lenders to Jackson. Once
24 again, the Prosecutor made statements without actually looking at the evidence. If he had
25 looked at the bank statements and reviewed the testimony of Purifoy, Hill and Paige, he
26
27 income from whatever source derived. *Comm'r v Schleier* 515 U.S. 323 (Supreme Court
28 1995). This includes gross receipts for a business.

1 would have known that Jackson was not paid after June 2013, so no “diversion” of
2 “returns” could have happened.

3 The Prosecutor states that “Harbour's” Affidavit attempts to detail the path of the
4 \$15 million. No, Jason Braun testified that he and other attorneys representing Jackson
5 authored the Affidavit, not Harbour. They detailed the path of the \$15 million. The
6 Prosecutor is still trying to show that Exhibit 886, a tax strategy by Harbour's then Tax
7 Lawyer, Jack Beaver, was fraudulent. Jack Beaver is a certified tax law specialist.
8 Beaver made an argument and the Tax Court rejected it, deeming the \$4.1 million to be
9 gross income to Harbour on the 2012 HighPointe Capital Group Schedule C. This brings
10 us full circle to the Prosecutors statement that Harbour's gross income cannot be used to
11 prove any material fact in the case. This concession by the government along with the
12 admission that it was unclear how Harbour used Jackson's money eradicates its
13 (uncharged) “case” with respect Jackson in its entirety.

14 The Prosecutor then decides that Harbour used the \$15 million for purposes that
15 were not intended by the agreement, with zero proof. Nowhere in the Affidavit, authored
16 by Jackson's lawyers, does it say that Harbour used the money *not* per the instructions of
17 Jackson. No where in the Affidavit does it accuse Harbour of making misrepresentations
18 or material omissions to Jackson. Nowhere in the Affidavit does it say Harbour stole \$6
19 million from Jackson. Nowhere in the Affidavit does it say Harbour had any control of
20 the other \$9 million. The government has no evidence, let alone clear and convincing
21 evidence that Harbour committed any fraud whatsoever with respect to Jackson. This is
22 all contrived nonsense.

23 The Prosecutor then tries to say that Harbour intended to lose Jackson's money and
24 therefore, the Court should use intended loss with Jackson because it was part of a Ponzi
25 scheme. *First*, the evidence proved the \$9 million was sent directly to Palo Verde, not
26 Harbour, therefore it cannot be considered for the alleged Ponzi scheme. *Second*, there is
27 no proof of any Ponzi scheme. In fact, AUSA Schoch told the Court the government was
28

1 not even alleging a Ponzi scheme in this case. The Prosecutor has not traced one dollar of
2 Jackson or any lender's money to Ponzi payments. *Third*, the Prosecutor is completely
3 ignoring that Harbour had revenue from multiple sources during the time frame of
4 Jackson's money including the Hospital Investment and the companies that Eckholt
5 testified to, meaning Harbour had a legitimate business. The Prosecutor cites to *U.S. v*
6 *Bowman* 81 Fed. Appx. 104 (9th Cir. 2003). This case makes it clear that the government
7 must prove similarity and temporal proximity and cites *U.S. v Hahn* 960 F.2d 903, (9th
8 Cir. 1992) on the requirements needed. In *Bowman* the scheme was telling the lenders
9 their money was backed by Lloyds of London. It was 38 investors over two years and the
10 two Ponzi schemes overlapped and the government traced the money coming in from one
11 lender and then being used immediately to make interest payments to an old lender.

12 In the instant case, it is 5 years from the offense of conviction, it has no similarity
13 to Burg and Turasky and the government did not trace one dollar from Jackson being
14 used to pay other lenders even though it told the Court it did. Finally, the money that was
15 used to pay Jackson back were Harbour's gross income from a legitimate business, not
16 lenders, and not material to any fact in the case.

17 *Hahn* also applies to Reace, Alofs, Gray, and White. They have no connection to
18 Burg and Turasky. Reace was in 2008, Gray and Alofs in 2010 and they were all a part of
19 the Hospital investment. In approving Harbour's \$15 million claim and confirming the
20 Plan of Reorganization, the Federal Bankruptcy Judge confirmed that the investment was
21 a not a fraud. Also, there is no temporal proximity and no similarities.

22 The Prosecutor next says that Harbour told lenders he attended an Ivy League
23 school.⁴ The only testimony at the trial about Harbour being a CPA and expecting a Lear
24

25
26 4 Harbour did attend an Executive Management program at the Wharton Business School
27 while at Arthur Andersen. Due to the Department of Justice putting AA out of business,
28 Harbour was not able to finish. Harbour never stated he went to Harvard.

1 Jet inheritance came from Eckholt.⁵ None of this was supported by the testimony of any
2 witness who loaned money to Harbour. Not one lender testified that Harbour told them
3 and they relied upon him going to a certain college, nor that he was a CPA, nor that he
4 was expecting to inherit Lear Jet stock as something they relied upon to loan him money.⁶

5 The Prosecutor is trying to now pivot and go all in on Jackson. The Prosecutor did
6 not name Jackson for Forfeiture or Restitution or in the SSI, but believes Jackson should
7 be used for sentencing enhancements. The Prosecutor habitually ignores the case law
8 with respect to intent to defraud, deceive and cheat, relevant conduct and loss causation.

9 *Intent to defraud*, Harbour and Jackson agreed in the joint Affidavit, Exhibit 397,
10 that Jackson signed a subscription agreement with Palo Verde and sent the \$9 million to
11 Palo Verde. Harbour borrowed \$6 million in 2009 and would pay it back in 2012. This is
12 exactly what Harbour did, no intent to defraud.

13 *Deception and Cheat*, Harbour got \$6 million, used it per Jackson's instructions,
14 as stated in Exhibit 397, and paid back \$6 million, so no deception and no cheat. He
15 never got or controlled \$9 million so no deceive or cheat there either.

16 *Temporal Proximity*, Jackson has zero connection to Burg and Turasky. He loaned
17 money 5 years prior and was paid back two years before Harbour borrowed money from
18 Turasky and received Burg's investment. There is no evidence of Jackson money being
19 used to pay Burg and Turasky or Burg and Turasky money being used to pay Jackson for
20 the Ponzi. No temporal proximity.

21
22
23 5 Larry Cook asked Harbour if he was a CPA and Harbour said no Doc. 844-2. Eckholt
24 testified Harbour told him he worked for a CPA firm, which the testimony proved was
25 true and the government admitted, Arthur Andersen. Since Eckholt is the only one who
26 testified to this, it is more probable than not that Eckholt just assumed Harbour was also a
27 CPA.

28 6 Eckholt testified that Harbour had a picture of his Grandfather in his office with Bill
Lear at a Lear Jet stock holders meeting. This is true and Harbour's Grandfather was one
of the original people with Lear Jet and he owned its stock.

1 *Similarity*, there is no connection or similar use of the money. The Prosecutor
2 admitted Green Circle was not a Ponzi scheme. The Prosecutor did not trace Jackson's
3 money and the evidence shows Harbour did invest it per his instructions. The Prosecutors
4 theory is Harbour did not invest any of Jackson's money, but did invest Burg and Turasky
5 money. No mention of misrepresentation or material omissions in Exhibit 397. There are
6 no similarities.

7 *Loss causation*, none on the \$6 million, it was not lost. Harbour had no control of
8 the \$9 million and the Receivership did not accuse Harbour of having any involvement in
9 the operations of Palo Verde or in the investment decisions. Therefore no loss causation.

10 The Prosecutor told the Court that Harbour's scheme was to get lenders money and
11 use it for personal expenses (Hr.6/6/23, pg.22). Now the Prosecutor is saying that
12 Harbour had a Ponzi scheme with Jackson's money. The “scheme” for relevant conduct
13 changes from one hearing and motion to the next.

14 The Palo Verde Receiver, in his final report stated; “In October 2017, the Receiver
15 issued his report which, among other things, described the Receiver’s findings regarding
16 the fraud committed by the General Partner of the Fund and recommended that the Court
17 not give priority to investors that remained in PVF over investors that the General Partner
18 transferred to PVPEF.” No criminal charges were ever brought against Palo Verde or
19 Tony Stacy, just like no criminal charges were ever brought against anyone in payday
20 lending. This Prosecutor is the only one alleging that Harbour should be responsible for
21 Palo Verde losing \$6.7 million of Jackson’s \$9 million and all the lenders who lost their
22 money because of Operation Choke Point. As we have pointed out previously, Palo
23 Verde was sued by an investor in the District of Oklahoma and the District Judge
24 dismissed it because the investor signed a subscription agreement acknowledging it knew
25 the risk of investing, same thing Jackson did as admitted to in Exhibit 397 #24.

26 ///

27 ///

Conclusion

The Prosecutor has changed his theory of Harbour's scheme from getting money to pay for personal expenses to a Ponzi scheme. There is no evidence of Harbour using money from Jackson, Donmoyer, Bobrow, Reace, Alofs, the Willsons, or Gray to make Ponzi payments.⁷ Under *Hahn*, the government cannot meet the clear and convincing standard of relevant conduct. This is just the latest example of the government playing fast and loose with the truth in the hope that it can convince the Court that what is false is true. We hope the Court is not taken in by this gambit.

Trying to bring Jackson and the supposed existence of a "Ponzi Scheme" back into this case after many months of trying to distract the Court's attention through the display of a series of other "shiny objects," is an obvious and desultory "Hail Mary." The government is not supposed to try the kitchen-sink approach *in seriatum* fashion. The government knows that Harbour is innocent of what he was charged with. Under *Berger* someone in that Office needs to absorb the meaning of what has been shown. The offenses of conviction have nothing to do with a Ponzi scheme. Period.

RESPECTFULLY SUBMITTED this 25th day of January 2024.

CHRISTIAN DICHTER & SLUGA, P.C.

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⁷ Exhibit 900 shows that someone other than Harbour was making the 2007 loan payments to Bobrow, as recorded by Lisa Berges for the Family Dollar store investment that the government called a fiction, except the money he received was obviously real money.

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2024 I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and for transmittal of Notice of Electronic Filing to the following CM/ECF registrants:

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